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ABSTRACT

Neil Devins, in part 1 of this chapter, discusses state regulation of home instruction. A different perspective on this subject is presented by Perry A. Zirkel in part 2. Parents have claimed that state regulations deprive them of their right, protected by the due process clause of the Fourteenth Amendment, to direct their children's upbringing. States claim that children must be ensured of education and of socialization; however, the "Duro v. District Attorney" decision too strongly emphasized the state's interest. The decision represents a shift from "Wisconsin v. Yoder," which sought to balance the religious liberty interest of the Amish community and that of the state. The line separating permissible from intrusive state regulations is unclear. The extent of parental authority must be discerned through an entanglement of state court decisions. Zirkel argues that lower courts' decisions have been relatively consistent in rejecting constitutional amendment rights for parents. Contrary to Devins' contention, courts have narrowly interpreted the "Wisconsin v. Yoder" ruling to reject parents' free exercise challenges against state statutes. Many court decisions have rejected parental nonreligious constitutional challenges. Without constitutional mandates, the issues of regulatory standards are a slippery but central concern. (CJH)

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Home Instruction: Two Views

Part I. Neil Devins
Part II. Perry A. Zirkel

Part I
State Regulation of Home Instruction: A Constitutional Perspective[1]

Neil Devins

How compelling is a state's interest in ensuring that its young receive an adequate education? Does this interest in an adequate education extend beyond reading, writing, and computation to socialization? And how does this interest compare with a parent's right to direct the educational and religious upbringing of his children? These fundamental questions are raised in lawsuits challenging state efforts either to prohibit or severely limit "home instruction."

Increasingly, parents are going to court to challenge restrictive state educational procedures on both statutory and constitutional grounds. On constitutional grounds, parents claim that these procedures deprive them of their fundamental right, protected by the due process clause of the fourteenth amendment and the free exercise clause of the first amendment, to direct the upbringing of their children. On statutory grounds, parents argue that their home study program satisfies vague "equivalency with public schools" statutes, or that their home should be viewed as a private school for purposes of state compulsory education laws.

These parents usually recognize that the state has authority to demand that its young attain minimum academic competency in a basic curriculum. Some states, however, contend that only through the total prohibition of home instruction or the development of comprehensive standards to regulate home instruction can they meet their compelling responsibility to ensure that every child in the state receives an adequate education.

This paper focuses on the constitutional limits of state regulation of home instruction. I intend both to explain the pertinent Supreme Court case law governing this issue and to set forth my views on the manner in which the state may constitutionally regulate the home study option.

1. This paper is adapted from Devins, *A Constitutional Right to Home Instruction*, 62 Wash. U.L.Q. 435 (1984).

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I must admit that I tip my hand by referring to home study as an option; for a federal court of appeals in *Duro v. District Attorney*[2] recently upheld as constitutional North Carolina's prohibition of home instruction. In my view, *Duro* was wrongly decided. Although a state may regulate home study so as to ensure that each child attain a certain level of educational competency, a state cannot deny or make meaningless a parent's *right* to teach his child at home. To conclude otherwise is to ignore that the parent-child bond is cherished under the Constitution. State interference with that bond must be justified as a matter of necessity and not simple preference. In this paper, I hope to make clear the above point.

Before discussing the specific legal issues raised in this type of case, I think it is important to understand the concerns of the parents and the state. Parents teach their children at home for a number of reasons, the most common of which is dissatisfaction with the academic and social environments of public schools.[3] For example, many of these parents are fearful of the "moral breakdown" in our public schools, which they associate with lack of discipline, sexual permissiveness, and drug and alcohol abuse.[4]

A great number of these parents are evangelical Christians who teach their children at home for religious reasons. A frequent complaint of these parents is that public schools have become too "secularized," with the result that religious values no longer have a place in public education.[5] This "secularization" is attributed to Supreme Court decisions that prohibit organized prayer,[6] Bible reading,[7] and posting of the Ten Commandments in public schools.[8] The inclusion of sex education and evolution courses in the public school curriculum, which some Christian educators find morally objectionable, exacerbates this problem.

In addition to their religion-based criticisms of the public schools, Christian educators also seek to advance a particular set of religious

2. No. 81-13-Civ-2, slip op. (E.D.N.C. Aug. 20, 1982), *rev'd.* 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984). North Carolina no longer prohibits home study. The Supreme Court of North Carolina ruled that – under state law – state education officials cannot categorically prohibit home instruction. Delconte v. State 329 S.E.2d 636 (N.C. 1985). For further discussion of court decisions interpreting state statutory provisions, *see* Tobak & Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. Dayton L. Rev. 1 (1982).

3. For an expanded discussion of parental dissatisfaction with the public school system, *see* Devins, *State Regulation of Chirstian Schools*, 10 J. Legis. 351, 355–9; S. Arons, Compelling Belief 75–134 (1983); Carper, *The Christian Day School Movement, 1960–1982*, 17 Educ. F. 135 (1983).

4. *See* D. Ham, Reasons Why Parents Enroll Their Children in Fundamentalist Christian Schools (unpublished Ph.D. dissertation, University of Missouri at Columbia, 1982).

5. *See* Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. Rev. 847; Whithead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implication*, 10 Tex. Tech. L. Rev. 1 (1978).

6. Engel v. Vitale, 370 U.S. 421 (1962).

7. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

8. Stone v. Graham, 449 U.S. 39 (1980).

values through home education. These parents believe that education should be inherently religious and thus oppose state efforts to license their home study programs. In court, they argue that state efforts to limit or prohibit home instruction deprive them "of their liberty to freely carry out their religious mission in the form of Christian education."[9]

States that seek to limit the home instruction alternative claim that the regulation (or even prohibition) of home instruction is necessary to ensure adequate education of their young. The Virginia State Board of Education, for example, sought to justify a "state approval of home tutor" requirement by suggesting that the home study environment was educationally deficient. The board felt it was reasonable for the general assembly to conclude that the more structured and controlled environment of an educational institution was superior to the more relaxed and private surroundings of a home education program.[10] Similarly, North Carolina sought to prohibit home instruction because the state claimed that it could not rely on the parents to provide the necessary motivation to the child to assure that the child has access to a quality education. "Unlike operators of nonpublic schools, the State believes that it cannot rely on the existence of collective market forces in the form of parental demands and concerns to assure that children have access to an education and that the education provided will be of some minimal quality."[11] One other argument advanced by the state in

9. Bangor Baptist Church v. State, 549 F. Supp. 1208, 1216 (D. Me. 1982) (citing plaintiff's petition). *See also* Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983); State v. Moorehead, 308 N.W.2d 60 (Iowa 1981); State v. Shaver, 294 N.W.2d 883 (N.D. 1980); State v. Riddle, 285 S.E.2d 359 (W.Va. 1981).

10. [T]he home environment usually is marked by relaxation, privacy, and close relationships formed by bonded lifetimes. It is reasonable for the General Assembly to conclude that education is provided to a greater extent in an environment where discipline and control is more objective, where the program and progress of study are verifiable, where the teacher has a singular role as a teacher, where the student has a singular role as student and where the exclusive focus and reason for meeting is the educational program.

Virginia Supreme Court Bars Parents' "Private School," Educ. Daily, Dec. 9, 1982, at 7. *See also* People v. Turner, 263 P.2d 685 (Cal. Ct. App. 1953), *appeal dismissed*, 347 U.S. 972 (1954) (parents teaching at home needed training certificate while teachers in private schools did not need a certificate). For the *Turner* court:

The most obvious reason for such difference in treatment is . . . the difficulty in supervising without unreasonable expense a host of individuals, widely scattered, who might undertake to instruct individual children in their homes as compared with the less difficult and expensive supervision of teachers in organized private schools.

263 P.2d at 688.

11. Appellant's Brief at 14, Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984). Thirty-four states permit some form of home instruction. Regulation of home education varies considerably among the states that allow home instruction. At one extreme, Louisiana allows parents to teach their children at home with minimal supervision. Parents need only provide the state board of education with a proposed home study program and have their children take a standardized achievement test at the end of each school year. At the other extreme, Michigan requires that "teachers for home instruction must be certified and instructions must be comparable to that provided in public schools." *See generally* Tobak & Zirkel, *supra* note 2.

home schooling cases is that "[t]he socialization of children in groups as essential. Only through peer-group schooling can children learn to get along in a highly independent society."[12]

Home study lawsuits pit the parents' interest in directing the educational and religious upbringing of their children against the state's interest in the adequate education of its youth. An understanding of these interests is necessary to answer the question whether parents have a constitutional right to instruct their children in the home.

Education is one of the state's most compelling responsibilities. In *Brown v. Board of Education*,[13] for example, the Supreme Court commented:

> Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society . . . in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education.[14]

Philip Kurland similarly noted the central role of schooling in the "American dream." According to Kurland, in America, education became the great equalizer. Individuals could raise their consciousness, ethics, culture, or earning power through education. These benefits to the individual translate into benefits to society. "Thus the United States became one of the most schooled societies in the history of man."[15]

Despite its primacy, the Supreme Court has held that education is not a fundamental right.[16] Consequently, courts are reluctant to interfere with state regulations and procedures governing the structure of education.[17] The authority of the state to promulgate reasonable regulations to govern all forms of schooling is beyond doubt. For example, in *Runyon v. McCrary*,[18] the Supreme Court indicated that a constitu-

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12. S. Arons, *supra* note 3 at 123. This "socialization" argument has been raised in court cases in Massachusetts, New Hampshire, Kansas and New Jersey. Perchemildes v. Frizzle, Civil Act. No. 16641 (Mass. Sup. Ct., Nov. 13, 1978) (rejecting "socialization" argument); State v. Hoyt, 146 A. 170 (N.H. 1929) (upholding "socialization" argument); *In re* Sawyer, 672 P.2d 1093 (Kan. 1983) (upholding "socialization" argument), State v. Massa, 231 A.2d 252 (N.J. 1967) (rejecting "socialization" argument).

13. 347 U.S. 483 (1954).

14. *Id.* at 493. *See also* cases cited in Clune, Coons & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Finance Structures*, 57 Calif. L. Rev. 305, 376–78 (1969).

15. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. Va. L. Rev. 213, 215 (1973).

16. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

17. Ironically, the state also has great authority to govern the structure of education because education is one of the state's most compelling responsibilities. *See supra* note 14 and accompanying text.

18. 427 U.S. 160 (1979).

tional right to send children to private schools does not mean that private schools could not be subjected to reasonable government regulation.[19] The well-being of children is clearly within the authority of the state to regulate and protect.[20] State power over the child may extend even beyond the exercise of constitutional rights by parents. In *Prince v. Massachusetts*,[21] for example, the Supreme Court upheld child labor laws over a legitimate free exercise claim. In so doing, the Court ruled that neither religion nor parenthood place the family beyond state regulation in the public interest.[22] Acting to guard the general interest in the youths' well-being, the state may restrict the parents' control by requiring regular school attendance or prohibiting child labor.[23]

State intervention in the parent-child relationship can be justified under one of two standards. One standard governs state intervention pursuant to the state's interest as a collective entity. The other standard governs state intervention on behalf of the child as a developing individual.[24]

The state's collectivist interest is merely an exercise of the state police power designed to promote the public welfare.[25] The scope of the legitimate governmental interference with the parent-child relationship on collectivist grounds is quite narrow. Judicial recognition of the fundamental nature of the parent-child bond mandates strict scrutiny of state efforts to interfere with that relationship. As stated in *Prince v. Massachusetts*:[26] "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[27] In *Roe v. Wade*,[28] the Supreme Court elaborated on the *Prince* ruling by suggesting that the fundamental privacy concept has "some extension" to family relationships.[29]

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19. *Id.* at 178.
20. Ginsburg v. New York, 390 U.S. 629, 639 (1968).
21. 321 U.S. 158 (1943).
22. *Id.* at 166. The *Prince* Court also recognized the primacy of parental authority over their children, *See infra* note 27 and accompanying text.
23. 321 U.S. at 166.
24. *See* Knudsen, *The Education of the Amish Child*, 62 Calif. L. Rev. 1506, 1511-17 (1974); Project, *Education and the Law: State Interests and Individual Rights*, 74 Mich. L. Rev. 1371 (1976); Note, *State Intrusion into Family Affairs: Justification and Limitations*, 26 Stan. L. Rev. 1383 (1974).
25. *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1199 (1980). "A large number of state ends have been considered legitimate objectives of the police power, including the promotion not only of the public health, safety, morals, or general welfare, but also more abstract goals like aesthetic and family values."
26. 321 U.S. 158 (1943).
27. *Id.* at 166. Likewise, in *Meyer v. Nebraska*, 252 U.S. 390 (1923), the Supreme Court stated that "to marry, establish a home, and bring up children" is a constitutionally protected form of liberty. *Id.* at 399.
28. 410 U.S. 113 (1973).
29. *Id.* at 152-156. Similarly, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1973), the Supreme Court invalidated a zoning ordinance that prohibited extended family members

Strict scrutiny analysis requires the state to demonstrate that its procedures are the least restrictive means available to effectuate some compelling state interest.[30] Few state regulations governing family conduct can pass constitutional muster under this standard. To justify an infringement of family affairs in the name of the state's collective interest, the state would have to demonstrate that its regulation prevents a near-certain societal harm. For example, regulations requiring children to be inoculated against contagious diseases embody one sufficiently strong state interest.[31] Whether less tangible dangers, such as the inability of an undereducated child effectively to exercise his franchise in a participatory democracy, constitutes a sufficiently compelling state interest is a more difficult question. The court's decision to uphold child labor laws in *Prince* suggested that the state might have such authority. Yet, in *Wisconsin v. Yoder*,[32] the Supreme Court held that the state's interest in compulsory education was not of sufficient magnitude to override a parent's interest in having the child exempted from public school for religious reasons.

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from residing in a single family dwelling because "freedom of personal choice in matters and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 499. The plurality opinion was of the view that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition." *Id.* at 503-04. *See also*, Stanley v. Illinois, 405 U.S. 645 (1972), (invalidating a state statute providing that illegitimate children, upon the death of their mother, become the wards of the state without a hearing on the parental fitness of the father); Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632 (1974) (state must demonstrate compelling interest to interfere with a woman's decision to have a child); United States v. Orito, 413 U.S. 139, 142 (1973) (constitutional right of privacy includes right of marriage, procreation, motherhood, child-rearing, and education); Loving v. Virginia, 388 U.S. 1 (1967) (freedom of choice in marital decisions); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing, in the family context, that "the specific guarantees in the Bill of Rights have penumbras . . . that help give them life and substance").

In contrast to this group of cases, the Supreme Court affirmed without opinion, the district court in Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd without opinion*, 423 U.S. 907. The *Baker* court, in recognizing the legitimacy of a state's parens patriae power in the corporal punishment context, held that "parental control over childrearing" should not be considered a fundamental right "in the hierarchy of constitutional values." *Id* at 299. The Supreme Court approved the use of corporal punishment in a subsequent decision, Ingraham v. Wright, 430 U.S. 651 (1977), without directly addressing the "fundamental rights" issue. *See also* Wyman v. James, 400 U.S. 309 (1971) (holding that the state's parens patriae interest in the child was sufficient to justify home visits by welfare caseworkers).

30. *See* L. Tribe, American Constitutional Law 1000-60 (1978).

31. In Jacobson v. Massachusetts, 197 U.S. 11 (1905), the Supreme Court upheld the right of the state to compel immunization of its citizens.

32. 406 U.S. 205 (1972). *Prince*, speaking in general terms of "the crippling effects of child labor" 321 U.S. at 168, ignored the peculiar circumstances of the case. *See id.* at 173 (Murphy, J., dissenting). *Yoder*, on the other hand, focused on these particular circumstances. For this reason, Philip Kurland suggested that *Yoder* made *Prince* an "unworkable precedent." Kurland, *supra* note 15, at 243.

States also attempt to justify their efforts to interfere in family affairs on the ground that the state has a right to protect the personal interests of a child—the state's role as *parens patriae*. The state's *parens patriae* power allows the state to interfere in family matters to protect the child's physical, educational, and emotional well-being.[33] The state may exercise its *parens patriae* power in the face of parental neglect.[34]

No bright line exists between acceptable and unacceptable parental behavior. Clearly, the state can demand that a child receive life-saving medical treatment.[35] The line between parental punishment and child abuse or between inattention and abandonment, however, is not so clear.[36]

States justify their compulsory education laws on both collectivist and *parens patriae* grounds. In *Wisconsin v. Yoder*[37] the Supreme Court recognized the legitimacy of both of these state interests. The Court approved the state's contention that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[38] The Court also acknowledged the state's *parens patriae* rights: "Education prepares individuals to be self-reliant and self-sufficient participants in society."[39]

Although the Court in *Yoder* recognized the legitimacy of a state's interest in mandating compulsory education, it upheld the claims of

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33. Note, *supra* note 24, at 1391–92.

34. S. Katz, When Parents Fail 57 (1971). Neglect statutes "in many respects, incorporates a community's view of parenthood. Essentially, they are pronouncements of unacceptable child practices."

35. *See, e.g.*, People *ex rel.* Wallace v. Labrenz, 104 N.E. 2d 769 (Ill. 1952), *cert. denied*, 344 U.S. 824 (1952); State v. Perricone, 181 A.2d 751 (N.J. 1962), *cert. denied*, 371 U.S. 890 (1963); *In re* Clark, 185 N.E.2d 128 (Ohio 1962).

36. Until the Supreme Court's landmark 1967 decision, *In re Gault*, 387 U.S. 1 (1967), courts were fairly deferential when reviewing an exercise of a state's parens patriae power. *See Developments in the Law*, *supra* note 25 at 1221–27. *Gault* held that the parens patriae doctrine was of "dubious relevance" in the juvenile delinquency context and thus the state could not invoke it to immunize state delinquency statutes from constitutional scrutiny. 387 U.S. at 44–56. Following *Gault*, courts began to invalidate certain parens patriae exercises on procedural due process, void-for-vagueness, substantive due process, or first amendment grounds. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1977) (substantive due process); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (first amendment); Breed v. Jones, 421 U.S. 159 (1975) (procedural due process); Davis v. Smith, 583 S.W.2d 37 (Ark. 1979) (void for vagueness).

37. 406 U.S. 205 (1972).

38. *Id.* at 221.

39. *Id.* Justice White, concurring, recognized a broader parens patriae interest, which included "the [state's] right to make a 'cultural' guess, the right to be able to predict the attributes of our future culture and design an 'educational package' to equip the child with the necessary cultural survival skills." *Id.* at 238–39 (White, J., concurring). According to

members of the Old Order Amish Faith who sought to exempt their children from high school attendance. First, the Court emphasized the diluted state interest in educating fourteen- and fifteen-year-old children who were socially acculturated and mentally developed.[40] Second, the Court accepted the proposition that the early teenage years were crucial in determining whether a child would remain a part of the Old Order Amish and, therefore, elevated the parents' interest in removing their children from school.[41]

The exemption granted the Amish in *Yoder* should not be construed as an unlimited license for parents to control the education of their children. At the outset, the Court noted: "There is no doubt as to the power of a State, having a high responsibility for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a state."[42] In addition, the Court stressed the self-contained nature of the Amish community.[43] Apparently, the Court would not have exempted the children in *Yoder* from public school attendance if they seemed likely to become members of the mainstream society.[44] Even if the children were to become part of the self-contained Amish community, the court would not have permitted their removal if they were too young to have acquired basic academic skills.[45] Finally, the Court suggested that it would not accord a similar right to parents who

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Justice White, "[a] state has a legitimate interest . . . in seeking to prepare [children] for the lifestyle that they may later choose." *Id.* at 240.

40. *Id.* at 223-25. In response to this conclusion, Philip Kurland noted:

> Never, I submit has the concept of the importance of secondary education received such a blow from the judiciary. Secondary education may not be regarded by a state as essential to "the physical or mental health of the child or to the public safety, order, or welfare" of the state. What is the justification for compulsory secondary education then? How could a state ever meet the burden placed on it by the Court here to show that it has a valid interest in educating its children beyond the primary grades?

Kurland, *supra* note 15, at 229–30.

41. 406 U.S. at 217–18.

42. *Id.* at 213.

43. *Id.* at 215–17. The Amish Order is distinct from other religions in that their daily life and religious practice stem from their literal adherence to "the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world.'" *Id.* at 216.

44. *Id.* at 215–17. The majority paid little attention to evidence produced by the state that "a significant number of Amish children do leave the Old Order." *Id.* at 245. (Douglas, J., dissenting). Instead, the majority assumed that the child would choose as an adult to remain in the Amish community. *Id.* at 224–25.

45. *Id.* at 225 (Court recognized need for minimum academic standards to fulfill the "social and political responsibilities of citizenship"). Significantly, the Court approvingly cited testimony of education expert Donald Erickson "that the Amish succeed in preparing their high school age children to be productive members of the Amish community. . . . [T]heir system of learning through doing the skills directly relevant to their adult roles in the Amish community [is] 'ideal' and perhaps superior to ordinary high school education." *Id.* at 212.

wished to remove their child from school for nonreligious reasons.[46] The Court emphasized that "[the compulsory attendance law] carries with it precisely the kind of objective danger to the free exercise of religion that the first amendment was designed to prevent."[47]

Despite the fact-specific nature of the opinion, much in *Yoder* suggests that parents have broad discretion to direct the upbringing of their children. Of foremost importance, the Court concluded that the state's communitarian and *parens patriae* interests were not sufficiently compelling to justify interference with family matters. According to the Court, "this case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[48] The Court's willingness to look at the peculiar circumstances of the case suggests that parents, at least in the religious liberty context, will be able to make evidentiary showings as to the adequacy of their child-rearing to exempt their children from otherwise reasonable state education regulations.[49] *Yoder* also contains substantial language concerning the parent's traditional rights in the child-rearing process. Exemplary of this language is the Court's comment that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[50] The Court further noted that the parents' right to prepare their children for additional obligations extended to "the inculcation of moral standards, religious beliefs, and elements of good citizenship."[51] Finally, in the case of free exercise challenges, the Court held that states should respect parental decisions

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46. The Court noted:

> [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, . . . their claims would not rest on a religious basis . . . [nor] rise to the demands of the Religion Clauses.

Id. at 215–16.

In many respects, this distinction between a parent's right to direct the religious upbringing of his child and a parent's right generally to direct his child's upbringing is unpersuasive. Granted, the religious liberty interest might form the basis of a stronger constitutional claim for exemption. *See, e.g.*, Boothby, *Government Entanglement with Religion: What Degree of Proof is Required?*, 7 Pepperdine L. Rev. 613 (1980); Devins, *A Fundamentalist Right to Education?*, Nat'l L.J. (Feb. 21, 1983). Yet parents have a fundamental liberty interest in deciding the general upbringing of their children. *See infra* notes 57–63 and accompanying text. Consequently, any state infringement on the parent-child relationship should demand of the state a demonstration that the intervention will serve its professed goal.

47. 406 U.S. at 218.

48. *Id.* at 230.

49. In this respect, the Court applied a different approach to the parent-state controversy in *Yoder* than in *Prince*. *See supra* note 32.

50. 406 U.S. at 232.

51. *Id.* at 233.

unless it appears that their decisions "will jeopardize the health or safety of the child or have a potential for significant social burdens."[52]

The *Yoder* Court's endorsement of parental rights typifies family law jurisprudence. For example, in *Parham v. J.R.*,[53] the Court upheld a Georgia statute providing for admission to state mental hospitals through parental request. After admission, the hospital staff would decide whether the child should be released or kept under care. The Court held that reliance upon the parental request was proper because the law presumes that parents possess both maturity and judgment to guide their children, but more importantly, because the parent-child bond will cause the parents to act in the best interest of their child.[54] Support for the notion of parental control can also be found in a group of Supreme Court cases that upheld constitutional claims made by school-

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52. *Id.* at 234. The *Yoder* Court did not, however, address the question whether an Amish child might have an independent right to attend public high school over his parents' objections. Justice Douglas dissented on this issue, noting that:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today.

Id. at 245 (Douglas, J., dissenting).

53. 442 U.S. 584 (1979).

54. *Id.* at 602. John Garvey similarly commented:

> It is the parents who are most familiar with the effects a particular design might have on their child. They are also in the best position to understand the motives behind a child's wishes and, indeed, to know what the child's unrepresented wishes are. A family right to autonomy would maximize the communication between family members. Moreover, family members are likely to be more capable than the state of providing the kind of continuing understanding and care necessary after any decision has been made that affects the long-term welfare of the child.

Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. Calif. L. Rev. 769, 816–17 (1978). The presumption that parents act in the "best interests" of their children is evidenced by the fact that courts require parental consent generally for all but life-saving medical treatment. *See*, Brown & Truitt, *The Rights of Minors to Medical Treatment*, 28 DePaul L. Rev. 289 (1982).

Limiting this parental authority are several Supreme Court decisions that recognize the minor's right to privacy to make decisions concerning abortion and birth control. *See, e.g.*, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976), (invalidating state statute that granted parents an absolute veto over a minor child's right to have an abortion); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (granting minors a right to be free from blanket prohibitions against the distribution of contraceptives). But, in *Bellotti v. Baird* 433 U.S. 622 (1979), the Supreme Court suggested that a state could require minor children to obtain either parental consent or court approval for an abortion. The Court observed that such a statutory scheme would preserve the child's rights, and at the same time provide a legitimate reinforcement of parental authority by the state. For the Court:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Id. at 638–39.

children against actions taken by local boards of education.[55] In this group of cases, the Court implicitly recognized the coextensive nature of the rights of parent and child.

Judicial deference to parental control thus often is grounded in pragmatic terms. A recent commentary summarized the reasons for this deference as follows: (1) parents are more sensitive to their child's needs than the state can possibly be; (2) parents will probably act in the child's best interest because of the close familial relationship; (3) the parental right to control the child's upbringing preserves the diversity of American society and serves as a barrier to state indoctrination.[56]

The *Yoder* Court's exemption of Amish children from compulsory attendance laws is the strongest Supreme Court statement on parental authority over their children's education. To the extent that the Court was addressing parents' religious claims, the Court's delineation of the extent of parental authority holds true. *Yoder*, however, contains too much language about the general authority of the state in education to be considered a strong precedent in favor of nonreligious claims.

Nonreligious claims find strong support in a group of decisions from the 1920s that recognized the due process rights of parents to direct their child's upbringing. The first case, *Meyer v. Nebraska*, involved a state regulation that prohibited the teaching of any language other than English through the eighth grade.[57] The Supreme Court found the regulation unconstitutional because "[a teacher's] right to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [fourteenth] [a]mendment."[58] Although the Court acknowledged that "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand discussions of civil matters is easy to appreciate," it concluded that such efforts to homogenize the young represent "ideas touching the relationship between individual and State [that are] wholly different from those [pluralistic notions] upon which our institutions rest."[59]

Expanding on *Meyer*, the Court in *Pierce v. Society of Sisters*,[60] explicitly recognized the right of parents to direct the upbringing of

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55. *See*, Island Tree Union School Dist. v. Pico, 457 U.S. 853 (1982) (right to receive information); Plyer v. Doe, 457 U.S. 202 (1982) (equal educational opportunity-nationality); Goss v. Lopez, 419 U.S. 565 (1975) (procedural due process); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (equal educational opportunity-wealth); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (free speech); West Virginia v. Barnette, 319 U.S. 614 (1943) (freedom of conscience).

56. *Developments in the Law*, *supra* note 25, at 1354. In addition to these pragmatic concerns, John Garvey noted that there is a legitimate parental interest in "living one's life through one's children, [which] might be called the parent's right to exercise his religion *through* the child, and to extend *through* the child ideas, language, and customs which the parent believes to be important." Garvey *supra* note 54, at 806.

57. 262 U.S. 390 (1923). Under this regulation, a court held a private tutor criminally liable for teaching German to an elementary school student.

58. *Id.* at 400.

59. *Id.* at 402.

60. 268 U.S. 510 (1925).

their children. In *Pierce*, the Court held unconstitutional an Oregon statute that required all children to attend public schools. The Court ruled that the State could not outlaw private schooling and that the Oregon statute would cause a state-imposed standardization that is contrary to the fundamental theory of liberty upon which American government is based. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[61]

In the last of these early decisions, *Farrington v. Tokushiage*, the Court held unconstitutional a statute that sought to promote the "Americanism" of pupils attending foreign language schools in the territory of Hawaii.[62] The Court held that these regulations "would deprive parents of fair opportunity to procure for their children" "instruction which they think is important and we cannot say is harmful."[63]

Recent Supreme Court decisions have eschewed these substantive due process principles which grounded *Meyer, Pierce*, and *Farrington*. Consequently, the right of parental control has only questionable significance to future challenges to state regulation. In fact, the Supreme Court now recognizes the constitutionality of reasonable state regulations of private schools that promote a compelling state interest in education. In *Board of Education v. Allen*,[64] for example, the Court observed that "[s]ince *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction."[65] The state therefore has the authority to impose reasonable regulations on the secular educational function of private schools or home study.[66] But, the Supreme Court has yet to determine where it

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61. *Id.* at 535. The Court, however, recognized that:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils, to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 534.

62. 273 U.S. 284 (1927). This legislation gave the territorial government the power to prescribe the schools' curriculum, entrance qualifications, attendance requirements, textbooks, and teacher qualifications. In addition, the territorial government received the authority to regulate the physical plant of schools, inspect facilities and teaching, collect fees, and issue permits.

63. *Id.* at 298.

64. 392 U.S. 236 (1968).

65. *Id.* at 245-46.

66. *See* authorities cited in Note, *The State and Sectarian Education: Regulation to Deregulation*, 1980 Duke L. J. 801, 811-12 n.59.

should draw the line between reasonable and unreasonable state regulations.

Without explicit Supreme Court guidance, it should come as little surprise that the totality of state and lower federal court decisions are not especially helpful in determining whether a state can constitutionally prohibit home instruction. Several courts have intimated that no such constitutional right exists.[67] Other courts have suggested that such a right might be grounded in the due process clause of the fourteenth amendment,[68] or the free exercise clause of the first amendment.[69] With the exception of a North Carolina lawsuit, *Duro v. District Attorney*, which will be discussed subsequently, court decisions which have addressed the issue of the constitutional rights of parents to utilize the home study option are of little precedential significance. The simple reason being that these court opinions have concerned regulations in states that permit some types of home instruction.[70]

When *Duro* was decided, North Carolina prohibited all home study. By upholding this absolute prohibition in 1983, the Fourth Circuit Court of Appeals indicated that a parent's interest in directing his child's upbringing (religious or otherwise) does not extend to home study.

The balancing of parental and state interests in North Carolina is especially complicated because of a 1979 state enactment which effec-

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67. *See* Hanson v. Cushman, 490 F. Supp. 109, 114 (W.D. Mich. 1980) ("The plaintiffs' claimed right to educate their children through a program of home study free from [state] requirement[s] . . . does not rise above a personal or philosophical choice, and therefore is not within the bounds of constitutional protection."); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 455, 461 (N.D. Ill. 1974) (same); State v. Hoyt, 84 N.H. 38, 40, 146 A. 170, 171 (1929) ("The state being entitled to supervise education, it is not an answer to a charge of failure to furnish supervised instruction to show that equivalent unsupervised instruction is given."); Shoreline School Dist. No. 412 v. Superior Court, 346 P.2d 999, 1003 (Wash. 1960), *cert. denied*, 363 U.S. 814 (1960) ("We find no merit in the contention of the [parents] that they are excused from the penalties of the compulsory school attendance law because school attendance is repugnant to their religion.")

68. *See* Perchemlides v. Frizzle, No. 16641, at 9 (Mass. App. Ct., Nov. 13, 1978) ("Nonreligious as well as religious parents have the right to choose from the full range of educational alternatives for their children."); Pierce v. New Hampshire State Bd. of Educ., 768, 451 A.2d 363, 367-68 (N.H. 1982) (Douglas and Brock, J.J., concurring) ("approval requirements for nonpublic school education may not unnecessarily interfere with traditional parental rights"); People v. Turner, 98 N.Y.S.2d 886, 888 (N.Y. App. Div. 1950) ("provided the instruction given is adequate and the sole purpose . . . is not to evade the statute, instruction given to child at home by its parent, who is competent to teach, should satisfy the requirements of the compulsory education law").

69. *See* State v. Nobel, Nos. S-791-0114-A, S-791-1005-A at (Mich. Dist. Ct., Allegheny County, Jan. 9, 1980) ("No evidence has been introduced in this case that would demonstrate that the state has a compelling interest in applying teacher certification laws to the Nobels [parents] or that the educational interest of the State could not be achieved by a requirement less restrictive on the religious beliefs of the Nobels.")

70. Another reason why courts have not resolved the constitutional issue is that litigants frequently do not raise this issue before the courts. In *State v. Lowry*, 383 P.2d 962 (1963 Kan.), for example, the Kansas Supreme Court upheld a public-or-private-school-only statute on statutory grounds because the question presented to the court was whether a home instruction program constituted a private school.

tively deregulated nonpublic schools.[71] Under, this statute, a nonpublic school would satisfy state standards merely by maintaining attendance and disease immunization records and by periodically administering a nationally recognized student competency examination.[72] Such deregulation, for the appellate court,[73] did not limit the state's compelling interest in compulsory education. Apparently, the appellate court would view *any* state regulation as preserving that compelling state interest. Second, the Fourth Circuit held that *Wisconsin v. Yoder* did not provide a source for parents' constitutional interest in home instruction. The appellate court viewed *Yoder* as a very narrow ruling — stressing the "self contained" nature of the Amish community and the limited exemption from secondary schooling sought by the Amish.[74] The appellate court did not view *Yoder* as balancing the state's interest in compulsory education against the parents' religious liberty interest.[75] Instead, the Fourth Circuit viewed *Yoder* as a fact-specific holding inapplicable to other types of religious exemption claims. Consequently, the appellate court rejected the parent's claim because "Duro [the parent] has not demonstrated that home instruction will prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system."[76]

In my view, *Duro* was wrongly decided. In explaining why I think this is so, I will review what I consider the appropriate bounds of state regulation of home instruction.

Duro can be criticized on two levels. First, by placing the burden of proof on parents, *Duro* represents a dramatic shift from *Yoder*, which sought to balance the competing interests of the parents and state.

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71. N.C. Gen. Stat. § 115C-378 (1980). The state legislature passed this statute in response to a state court decision which upheld — over religious liberty objections — comprehensive regulations of private schools, including teacher certification. State v. Columbus Christian Academy No. 78 (Wake County, N.C. Super. Ct. Sept. 1, 1978), *vacated as moot and dismissed*, (N.C. May 4, 1979).

72. N.C. Gen. Stat. § 115C-378 (1980).

73. The federal district court concluded that the state's interest in education "is little more than an empty concern." No. 81-13-Civ.-2 slip op. at 7 (E.D.N.C. Aug. 20, 1982). Relying, in part, on the Supreme Court's *Wisconsin v. Yoder* decision, the district court held that because the North Carolina legislature "has abdicated its interest in the quality of education received by students in nonpublic schools in favor of 'the rights of conscience,' " the state interest was outweighed by the parents' religious liberty interest. *Id.* at 6.

74. 712 F.2d at 98.

75. *Id.* ("The facts in the present case are readily distinguishable from the situation in *Yoder*. The Amish were a 'rural self-sufficient community.' ") Additionally, the appellate court never addressed the issue whether parents might have a due process right to teach their children at home.") *See supra* notes 57-63. Clearly, since *Yoder* recognized that religion-based claims were more compelling than secular claims, the parents would have lost on this issue. *See supra* note 46. Moreover, Mr. Duro's attorney never raised this issue in his brief before the appellate court.

76. 712 F.2d at 99. Significantly, in their statement of the facts, the appellate court noted that "despite Duro's concern that his children be sheltered from corrupting influence, he admits that when they reach eighteen years of age, he expects them to 'go out and work . . . in the world.' " *Id.* at 97.

Second, *Pierce* suggests that parents have a right to shape the contours of their children's education. Consequently, it appears that academic achievement, rather than socialization, is the essence of the state's compelling interest in education. Therefore, the *Duro* court was wrong to emphasize socialization. By failing to take into account both the primacy of parental rights and the nature of the state's interest in education (not socialization), the *Duro* court never seriously evaluated the scope of legitimate state authority over home instruction.

The state clearly has a legitimate interest in ensuring that all children are afforded the opportunity to become viable members of contemporary society. Yet, the state must demonstrate that its actions will serve this legitimate purpose before it interferes with the parent-child relationship. Robert Burt, looking at Supreme Court decisions protecting other "fundamental rights" from state intrusion, suggested the following standard: "[1] Has the need for state intervention been convincingly identified, and [2] is there a close correspondence between that need and the means proposed to satisfy that need."[77] In other words, "when the state contravenes parental decisions in child rearing with the claimed purpose of benefiting the child, the state must present a convincing case that its intervention, in fact, will serve its professed goal."[78]

A state would be hard pressed to justify a total prohibition of home instruction under this standard. North Carolina, in the *Duro* lawsuit, contended that it "'does not permit home instruction because [it] has no mechanism by which to assure that children in a home with their parents are provided access to any education whatsoever.'"[79] This justification seems spurious because the state could demand that home study students be taught by a capable teacher or pass competency examinations. In short, it would appear that the state could satisfy its interest in education through less restrictive means than the total prohibition of home study.

The state clearly has authority to impose some regulations on home study programs. It is, however, difficult to draw the line separating permissible from intrusive regulations. Regulations governing core curriculum, length of school day and school year, student reporting and competency examinations are clearly constitutional. Expansive curriculum requirements or state prescribed textbooks, however, are unconstitutional.[80] The real difficulty lies in the evaluation of intermediate curriculum and teacher certification requirements. Teacher certification is a particularly knotty issue because, in many cases, requiring certification will effectively foreclose the home study alternative. Considering that competency examinations can ensure adequate achievement prior to academic advancement, it would appear that teacher

77. Burt, *Developing Constitutional Rights of, in and for Children*, 39 Law & Contemp. Probs. 118, 127 (1975).

78. *Id.*

79. Duro v. District Attorney, No. 81-13-Civ.-2, slip op. at 6 (E.D.N.C. Aug. 20, 1982).

80. Court rulings on the analogous issue of the constitutionality of state regulations governing Christian day schools support this conclusion.

certification requirements that are so stringent as to preclude the home education option probably are unconstitutional.[81]

Competency examinations provide the best vehicle to balance the state's interest in an educated populace against a parent's interest in directing the upbringing of his children.[82] State objections to achievement tests are unconvincing as a policy matter. The state contends that its objective is not merely to identify those students who do not learn their lessons; rather, it is to promote the likelihood that the educational system will provide every child with the basic education to function effectively in society. Thus the state may view after-the-fact regulations as an ill-fitted substitute for state-imposed educational standards. Underlying (and ultimately fatal to) this argument is the presumption that a substantial enough number of those home study students will fail to justify state-imposed burdens on pluralism, religious liberty, and parental rights. The evidence, however, is to the contrary.[83] If anything, it appears that parents who teach their children at home are doing a better job than the public schools.[84]

It is impossible to provide a hard and fast determination of what the state can and cannot do in its regulation of home study programs. Yet, neither the state's communitarian interest in a well-functioning open political system, or its *parens patriae* interest in the eventual economic self-sufficiency of its youth, is sufficiently strong to justify a total prohibition of home instruction.[85] A parent's right to direct the religious upbringing of his child should carry with it the right to a meaningful home study option. Until the Supreme Court chooses to review this issue, it appears that the basic questions concerning parental authority in the instruction of their children will be discerned through an entangled body of state court decisions.

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81. The state can still require ad hoc determinations of competency. The state, however, probably cannot demand that parents comply with such formalistic criteria as receipt of a college diploma.

82. For an alternative suggestion, see Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353, 374-77 (1979-80) (recommending home visits and other types of professional evaluation).

83. *See Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess., 554-56 (1979) (Testimony of Dr. Paul Kienel, Executive Director of the Association of Christian Schools International).

84. *See* Heard, *Church-Related Schools: Resistence to State Control Increases*, Educ. Wk., Feb. 17, 1982, at 1, 11, 18. Courts that have addressed this issue in the context of state regulation of Christian schools are evenly divided on the adequacy of competency tests issue. *Compare* Kentucky State Bd. v. Rudasill, 589 S. 2d 877, 884 (Ky. 1979) (encourages the use of such tests) *with* State v. Faith Baptist Church, 301 N.W.2D 571, 579-80 (Neb. 1981) (criticizes the use of such tests).

85. For a similar conclusion, see Note, *The Right to Education: A Constitutional Analysis*, 44 U. Cin. L. Rev. 796, 809 (1975) ("At the very least the substantive due process theory calls into question the constitutionality of compulsory education for many children."); Note, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. Rev. 191, 206 ("any compulsory education statute which does not allow [or places severe limits on] home instruction . . . should be struck down as violative of the Constitution").

Home Instruction: Two Views

Part II
Constitutional Contours to Home Instruction
A Second View

Perry A. Zirkel

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Some points of the preceding paper[1] are debatable. For example, the available evidence is too scant and skewed to justify the unqualified generalization that "parents who teach their children at home are doing a better job than the public schools."[2] Similarly, Devins' dual building blocks of communitarian and *parens patriae* interests, as he elsewhere admits,[3] are inexact concepts subject to normative judicial interpretation. Yet he relies on the Burt standard to constitutionally apply these interests to home instruction without showing that it is judicially accepted, much less controlling.

However, reversing and revising Shakespeare, I come to complement Devins, not to bury him. His paper is prescriptive. He argues that parents should be constitutionally entitled to educate their school-aged children at home, based on the free exercise clause of the first amendment and the due process clause of the fourteenth amendment. My paper is descriptive. I conclude that rather than being "entangled,"[4] the lower courts have provided a relatively long and consistent line of reported decisions that specifically reject the purported first amendment and fourteenth amendment rights to home instruction.

First Amendment Free Exercise

In support of his assertion of a preponderating first amendment religious right to home instruction, Devins principally relies on *Wiscon-*

1. Devins, *State Regulation of Home Instruction: A Constitutional Perspective*, in School Law Update 1986 (T. Jones & D. Semler eds., in press).

2. *Id.* at n.n.84,85 and accompanying text. For a more specific analysis, see the sources cited in note 50 *infra*.

3. *See* Devins, *A Constitutional Right to Home Instruction?*, 62 Wash. U.L.Q. 435, 468, 470 (1982); *cf.* Martin, *Excluding Women from the Educational Realm*, 52 Harv. Educ. Rev. 133 (1982) (public, or productive, purpose and private, or reproductive, purpose of education).

4. Devins, *supra* note 1 at n.n.84, 85 and accompanying text.

sin v. Yoder.[5] This reliance is problematic. He identifies some but not all of the limitations imposed by the *Yoder* Court. Although he points to the factual constraint of the religiously self-contained nature of the Amish community, Devins does not allude to the Court's emphasis on the community's economic self-sufficiency, long history, and educational effectiveness.[6] Indeed, the Court suggested that "probably few other religious groups or sects" could qualify for this limited exemption.[7] Moreover, the Wisconsin statute was an implied-exception rather than a no-exception, or prohibitive type exception. In that statutory context the Court was careful to not undermine the state's power to reasonably regulate the "continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated."[8] Despite these severe constraints, Devins portrays *Yoder* as "the strongest Supreme Court statement on parental authority over their children's education," and based thereupon he predicts that "parents, at least in the religious liberty context, will be able to make evidentiary showings as to the adequacy of their child-rearing to exempt their children from otherwise reasonable state education regulations."[9]

Quite to the contrary, in a solid body of reported decisions, courts have narrowly interpreted and applied *Yoder* to consistently reject parents' free exercise challenges against home instruction statutes.[10] The relevance of these court decisions are best understood by grouping them according to the three types of home instruction statutes — 1) those providing an express exception for home instruction; 2) those providing an implied exception, based on language like "equivalent" instruction; and 3) those providing no exception, express or implied.[11] A cluster of pre-*Yoder* decisions set the consistent course of precedent by rejecting the free exercise claims of parents in relation to all three types of statutes.[12] The *Yoder* decision did not reverse the direction of the reported cases; subsequent free exercise challenges to no-exception

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5. 406 U.S. 205 (1972).

6. *Id.* at 223, 228 (self-sufficiency); 219, 230 (long history); 225 (educational effectiveness).

7. *Id.* at 235-36.

8. *Id.* at 237.

9. Devins, *supra* note 1, at n.n.49-56 and accompanying text.

10. Although referred to herein with a shorthand form of directness as "home instruction statutes," this state legislation is more properly or commonly referred to as compulsory education (or compulsory attendance) laws.

11. Tobak & Zirkel, *Home Instruction: An Analysis of Statutes and Case Law*, 8 U. Dayton L. Rev. 1, 5-12 (1981).

12. No-exception type: State *ex rel.* Shoreline School Dist. No. 412 v. Superior Ct., 346 P.2d 999 (Wash. 1959), *cert. denied*, 363 U.S. 814 (1960); State v. Hoyt, 146 A. 70 (N.H. 1929); State v. Peterman, 70 N.E. 550 (Ind. Ct. App. 1904). Another decision, State v. Garber, 419 P.2d 896 (Kan. 1966), *cert. denied*, 389 U.S. 51 (1967), was consistent with this pre-*Yoder* cluster, but its facts were similar to those of *Yoder*. Implied-exception type: Common-

statues[13] have been as consistently unsuccessful as those implied-exception[14] and express-exception[15] statutes.

In total, a long and unbroken line of reported court decisions concerning the first amendment and home instruction, including at least one by a federal circuit court of appeal and four by state supreme courts after *Yoder*, are arrayed against one unreported decision by a county court in Michigan.[16] For example, the Nebraska and Arkansas Supreme Courts and the Fourth Circuit have each upheld the constitutionality of no-exception type statutes with regard to the free exercise clause by clearly, albeit quickly, pointing to the narrow factual constraints of *Yoder*.[17] Court decisions concerning the first amendment, the regulation of parochial schools and dicta from home instruction statutory interpretation cases[18] are less directly relevant. They do not significantly change the clear weight of authority.[19] Thus, the fundamental religious right to home instruction can only be described at this point as being severely limited.

Fourteenth Amendment Liberty

In support of his assertion of a preponderant fourteenth amendment nonreligious right to home instruction, Devins principally relies on *Meyer v. Nebraska*[20] and *Pierce v. Society of Sisters*,[21] both dating back

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wealth v. Renfrew, 126 N.E.2d 109 (Mass. 1955). Express-exception type: Rice v. Commonwealth, 49 S.E.2d 342 (Va. 1948).

13. Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984); Burrow v. State, 669 S.W.2d 441 (Ark. 1984); State v. Morrow, 343 N.W.2d 903 (Neb. 1984).

14. State v. Moorhead, 308 N.W.2d 60 (Iowa 1981); Jernigan v. State, 412 So. 2d 1242 (Ala. Crim. App. 1982); Hill v. State, 410 So. 2d 431 (Ala. Crim. App. 1981); *cf.* Mazanec v. North Judson-Jan Pierre School Corp., 763 F.2d 845 (7th Cir. 1985).

15. State v. Riddle, 285 S.E.2d 359 (W. Va. 1981); T.A.F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); *cf.* Singer v. Wadman, 595 F. Supp. 188 (D. Utah 1984). In an unreported opinion, Virginia's Supreme Court recently denied the appeal of "traditional Catholic" parents who alleged a free exercise right to home instruction. The parents have filed for certiorari with the Supreme Court. Snider v. Commonwealth, No. 84-0377 (Va. S. Ct. Nov. 21, 1984), *cert. filed*, 54 U.S.L.W. 3071 (U.S. Aug. 6, 1985).

16. State v. Nobel, Nos. S791-0114A & S791-0115A (Mich. Dist. Ct., Allegan County, Jan. 9, 1980).

17. *See supra* note 13.

18. Devins, *supra* note 1, at n.68, n.80.

19. For the most recent reported private school decisions, *see* Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp. 81 (D. Mass. 1985) (upheld requirements as to hours, subjects, and teachers); Johnson v. Charles City Community Schools Bd. of Educ., 368 N.W.2d 74 (Iowa 1985) (upheld rejection of parents' request for "Amish exception" under *Yoder*).

20. 262 U.S. 390 (1923).

21. 268 U.S. 510 (1925).

to the 1920s.[22] These Supreme Court decisions were early explorations of the constitutional contours of the two different institutional variants of compulsory schooling – public and private. Neither decision dealt with home instruction, which was a largely distant issue and an arguably noninstitutional form of education. Further, the language about parental liberty rights constitutes dicta in both decisions.[23] The parties facing the state were a private school teacher and private school corporations respectively, not parents. Moreover, with corresponding dicta in *Meyer* the Court recognized "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools."[24] Similarly, in *Pierce* the Court stated: "No question is raised concerning the power of the state . . . to require that all children of proper age attend some school."[25]

More importantly and again in contrast to that which Devins characterizes in his paper as "an entangled body of state court decisions"[26] and "of little precedental value,"[27] there has been a substantial line of federal and state court decisions consistently rejecting parental nonreligious challenges to the constitutionality of no-exception[28] and implied-exception[29] type home instruction statutes.[30] The federal district court's following reaction to the plaintiff-parents' assertion of substantive due process, privacy, and equal protection rights is rather typical of the more recent case law:

> Plaintiffs have established no fundamental right which has been abridged by the compulsory attendance statute. Thus, the state need not demonstrate a "compelling interest" . . . in requiring children to

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22. Devins also cites Farrington v. Tokushige, 273 U.S. 284 (1927), to which the following comments *infra* are also applicable.

23. For countervailing dicta about the paramount interest in public education which is based on more recent decisions by the Supreme Court, *see* Ambach v. Norwick, 441 U.S. 68, 76-78 (1979); *cf.* Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (inculcation of community values).

24. 262 U.S. at 402.

25. 268 U.S. at 534.

26. Devins, *supra* note 1 at n.85.

27. *Id.* at n.70.

28. Hanson v. Cushman, 490 F. Supp. 109 (W.D. Mich. 1980); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974); *In re* Sawyer, 672 P.2d 1093 (Kan. 1983); Parr v. State, 157 N.E. 555 (Ohio 1927); State v. Edgington, 663 P.2d 374 (N.M. Ct. App. 1983), *cert. denied*, 104 S. Ct. 354 (1983).

29. State v. McDonough, 468 A.2d 977 (Me. 1983); State v. Bowman, 653 P.2d 254 (Or. 1982); *In re* Shinn, 195 Cal. App. 2d 603, 16 Cal. Rptr. 165 (Ct. App. 1961); People V. Turner, 263 P.2d 685 (Cal. Ct. App. 1953), *appeal dismissed*, 347 U.S. 972 (1954); Knox v. O'Brien, 72 A.2d 389 (N.J. Cape May County Ct. 1950); Stephens v. Bongart, 189 A. 131 (N.J. Essex County Ct. 1937); *In re* Franz, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977).

30. These fourteenth amendment challenges generally have been formulated in terms of parental liberty or privacy, with lesser use of the equal protection clause. The separate fourteenth amendment challenge of vagueness, which is not part of Devins' thesis, is treated in a subsequent section of this paper.

> attend school. Under the test of *Pierce* and *Yoder* the Illinois statute . . . is reasonable and constitutional.[31]

Arrayed against this solid phalanx of authority is one unreported lower court decision that was focused more on the procedural than on the substantive side of the fourteenth amendment.[32] Devins dismisses the significance of the few decisions that he cites. He maintains, "[they] have concerned regulations in states that permit some types of home instruction."[33] Rather, five of the decisions cited above dealt with no-exception, or prohibitive, statutes.[34] Moreover, by directly addressing not just the complete prohibition but also the comprehensive regulation of home instruction, Devins has opened the door to the immediately neighboring, and most closely analogous, court decisions concerning the other types of such statutes. Thus, as with the first amendment, the fourteenth amendment has been substantively interpreted by the courts quite to the contrary of what Devins prescribes.

Fourteenth Amendment Vagueness

Ironically, the only constitutional avenue by which parents have achieved some notable success specific to home instruction is not addressed by Devins' thesis. Namely, some recent suits have been successful by focusing on the alleged vagueness of one or another terms in the challenged home instruction statute rather than by focusing on the asserted substance of one or another home instruction rights of the challenging parents. Although there has been some success in vagueness challenges against terms like "school"[35] and "equivalent,"[36] there is countervailing authority that prevents the successful side from being classified as the majority view. The case law concerning this issue is rather recent. It has not clearly crystallized in either direction.

Georgia's Supreme Court held the term "private school," in the absence of a definition or criteria in state regulations, to be constitutionally vague in the criminal context of that state's no-exception compulsory education statute.[37] In the context of an implied-exception statute,

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31. Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452, 461 (N.D. Ill. 1974).

32. Perchemlides v. Frizzle, No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978). The focus was an implied-exception statute that, in an earlier version, had been interpreted by the state's highest court in Commonwealth v. Roberts, 34 N.E. 402 (Mass. 1893), as allowing home instruction.

33. Devins, *supra* note 1 at n.70.

34. No-exception type statutes are not completely prohibitive to the extent that home instruction qualifies as private school. Courts have been divided as to this statutory interpretation question. *Compare, e.g.*, State v. Lowry, 383 P.2d 962 (Kan. 1963) *with* People v. Levisen, 90 N.E.2d 213 (Ill. 1950).

35. *See infra* notes 37-40.

36. *See infra* notes 41-44.

37. Roemhild v. State, 308 S.E.2d 154 (Ga. 1983); *cf.* State v. Popanz, 332 N.W.2d 750 (Wis. 1983) (private school case).

Virginia's highest court and Oregon's intermediate court each rather summarily rejected the argument that "private school" was unconstitutionally vague.[38] Similarly, Wisconsin's intermediate appellate court read all of the state's statutes relating to private schools together as providing a definition of "private school" such that persons of ordinary intelligence need not guess its meaning.[39] Florida's intermediate appellate court similarly rejected a vagueness challenge focused on the terms "school" and "home" in that state's explicit-exception statute.[40] Arkansas' highest court disposed of a vagueness challenge to its no-exception statute by treating it as an "as applied" issue, concluding that the other plaintiff-parent lacked standing to raise the issue "on its face."[41]

Similarly, the Seventh Circuit partly sidestepped a vagueness challenge to the term "equivalent" in Illinois' implied-exception statute by applying *Pullman*-type abstention, stating en route: "The term 'equivalent instruction' may be brief but brief is not vague."[42] Iowa's Supreme Court more directly rejected a vagueness challenge to the term "equivalent instruction" in that state's implied-exception statute, pointing to the detailed curriculum requirements for public and nonpublic schools as providing sufficient standards.[43] Finding the Missouri statute as "not so readily comprehensible," however, the federal district court in Missouri held the term "substantially equivalent" in that state's implied-exception statute to be constitutionally vague.[44] Similarly, Minnesota's Supreme Court rejected the term "essentially equivalent" as being unconstitutionally vague in light of the penal effect of Minnesota's implied-exception statute.[45]

In any event, the vagueness argument only extends to the language of the statute and its implementing regulations. Even where the penal effect is clear[46] or the courts are otherwise strict in applying vagueness challenges, the defect is remediable by adding sufficiently specific definitions or standards. Further, providing sufficiently specific standards for "equivalence," which has been more vulnerable to vagueness challenges, would seem easier than establishing a significantly improved

38. Grigg v. Commonwealth, 297 S.E.2d 799 (Va. 1982); State v. Bowman, 653 P.2d 254 (Or. Ct. App. 1982).

39. State v. White, 325 N.W.2d 76 (Wis. 1982).

40. State v. Buckner, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985).

41. Burrow v. State, 669 S.W.2d 441 (Ark. 1984).

42. Mazanec v. North Judson-San Pierre School Corp., 763 F.2d 845, 848 (7th Cir. 1985).

43. State v. Moorhead, 308 N.W.2d 60 (Iowa, 1981). This court similarly rejected a vagueness challenge to the connected term "certified teacher."

44. Ellis v. O'Hara, 612 F. Supp. 379, 381-82 (E.D. Mo. 1985). Although the statute does not carry criminal penalties, this court found a source of strict scrutiny in the *Yoder-Pierce* constitution interests.

45. State v. Newstrom, 371 N.W.2d 525 (Minn. 1985). Although citing *Pierce* without deciding its impact, the court rejected a broad interpretation and application of *Yoder*. *Id.* at 530-32.

46. Query the effect of a provision like that of the Texas Penal Code art. 1.05(a): "The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of the code shall be construed according to the fair import of their terms, to promote justice and the objectives of the code."

definition of "school," which has been thus far more resistant to vagueness challenges. Thus, on the more fundamental level, these challenges do not in themselves preclude prohibiting or closely regulating home instruction programs.

Conclusion

This short paper complements Devins' longer companion paper concerning the constitutional contours of home instruction.[47] What he prescribes as the judicial norm, I describe as not the judicial norm. The two views are not necessarily contradictory. His focus is not "what is" but "what should be." In our adversarial judicial system, case law changes arise from ardent and artful advocacy by practitioners and scholars. By venturing where I have not, Devins advances a view of what-should-be that may possibly become what-will-be. Even if the courts remain unreceptive, legislatures may more assuredly benefit from his thoughtful analysis.[48] The current trend among legislators and administrative agencies at the state level is apparently toward allowing home instruction.[49] At this appropriate level,[50] without specific constitutional mandates, the political and pedagogical issues of the appropri-

47. These two papers do not address home instruction cases based on statutory interpretation. For case law developments in this separate area, see, e.g., Tobak & Zirkel, *supra* note 11. This case law continues to develop apace. *See, e.g.*, Mazanec v. North Judson-San Pierre School Corp., 614 F. Supp. 1153 (N.D. Ind. 1985); Delconte v. State, 329 S.E.2d 637 (N.C. 1985); *In re* Chapman, 480 N.Y.S.2d 433 (N.Y. Fam. Ct. 1985).

Nor do these papers focus on recent developments with regard to legislation and regulations. *See infra* note 48 and accompanying text.

48. As the Supreme Court suggested in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 42, 58 (1973), such determinations are often better left to the legislative branch.

Parenthetically, in the recent Gallup poll on education, the attitudes of the public as to the "home schools movement" were as follows: good-16%, bad-73%, don't know-11%. Their responses as to requiring the same teacher certification standards for home schools as those for the public schools were: should-82%, should not-15%, don't know-8%. *The 17th Annual Gallup Poll*, 67 Phi Delta Kappan 40, 46 (1985).

49. According to Patricia Lines, formerly with the Education Commission of the States, approximately 12 states have changed their laws within the past two years to be less restrictive about home instruction. Telephone conversation, Nov. 8, 1985. This trend is not uniform, being subject to the pushes and pulls of the educational policy making process. *See, e.g.*, Educ. Week, Aug. 28, 1985, at 3 (new Maryland regulations reportedly closing loophole in state home education law); Educ. Week, June 5, 1985, at 3 (Arkansas attorney general reportedly urging amendment to recently adopted home education law).

50. Although there is other secondary authority agreeing with Devins' view, several scholarly commentators have concluded that home instruction is largely a legislative matter. *Compare, e.g.*, Stocklin-Enright, *The Constitutionality of Home Instruction: The Role of the Parents, State and Child*, 18 Willamette L.J. 568 (1982); Note, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. Rev. 191 (1979) *with* Comment, Parental Rights: *Educational Alternatives and Curriculum Control*, 26 Wash. & Lee L. Rev. 277 (1979); Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353 (1980); Note, *Home Education v. Compulsory Attendance Laws: Whose Kids Are They Anyway*, 24 Washburn L.J. 274 (1983).

ate number and nature of regulatory standards, from competency testing to teacher certification for "reasonable" regulation, are a slippery but central concern. I also compliment, not just complement, Devins for providing a relatively balanced treatment of the case law as part of his advocacy-type analysis.[51]

51. *Compare* Zirkel, *Defense of Home Instruction Not Warranted*, Educ. Week, Oct. 30, 1985, at 19 *with* Lines, *States Should Help, Not Hinder, Parents' Home-Schooling Efforts*, Educ. Week, May 15, 1985, at 24.